

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 95-F-10

Date Issued: October 23, 1995

Requested by: Mr. Mark Boening
Cass County Assistant State's Attorney

- QUESTIONS PRESENTED -

I.

Whether Congress has authority to require a North Dakota court to give full faith and credit to a foreign state or tribal protection order pursuant to 18 U.S.C. § 2265.

II.

Whether North Dakota statutory provisions pertaining to enforcement of protection orders are pre-empted by provisions of 18 U.S.C. § 2265 inconsistent with state law.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that Congress has authority to require a North Dakota court to give full faith and credit to a foreign state or tribal protection order pursuant to 18 U.S.C. § 2265.

II.

It is further my opinion that North Dakota statutory provisions pertaining to enforcement of protection orders are pre-empted by provisions of 18 U.S.C. § 2265 to the extent that they are inconsistent with federal law.

- ANALYSES -

I.

Article 4, Section 1 of the United States Constitution provides:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

The full faith and credit clause requires that other states give a judicial decree the force and effect to which it was entitled in the state where rendered. If a judgment is an enforceable judgment in the state where rendered, the full faith and credit clause imposes a duty to give effect to that judgment even though the modes of procedure to enforce the judgment may not be the same in both states. Sistare v. Sistare, 218 U.S. 1 (1910).

18 U.S.C. § 2265 specifically sets forth the requirement that states and Indian tribes grant full faith and credit to a protection order issued by another state or Indian tribe. 18 U.S.C. § 2265 provides:

Sec. 2265. Full faith and credit given to protection orders

(a) Full faith and credit.--Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

(b) Protection order.--A protection order issued by a State or tribal court is consistent with this subsection if--

(1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or counter petition.--A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against

abuse by a spouse or intimate partner is not entitled to full faith and credit if--

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

The term "protection order" is defined in 18 U.S.C. § 2266 as:

"protection order" includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

18 U.S.C. § 2265(a) requires that the state or Indian tribe enforce the protection order of another state or Indian tribe issued consistent with 18 U.S.C. § 2265(b) as if it were the order of the enforcing state or tribe.

Article 4, Section 1 of the United States Constitution authorizes Congress to adopt laws to implement the full faith and credit clause. 18 U.S.C. § 2265 is an act implementing the full faith and credit clause establishing the manner in which the judicial proceedings shall be proved and the effect of such proof. This implementing statute is consistent with the full faith and credit clause of the United State Constitution (Art. 4, § 1) and, it is my opinion, that Congress acted within its authority granted by that constitutional provision in enacting 18 U.S.C. § 2265.

II.

A review of 18 U.S.C. § 2265 and North Dakota statutory provisions concerning the enforcement of foreign judgments, criminal penalties for violating protection orders, and the warrantless arrest of violators of protection orders discloses conflicts in enforcement of out-of-state or tribal protection orders by North Dakota courts.

N.D.C.C. ch. 28-20.1 sets forth procedures for the enforcement and filing of foreign judgments, decrees, or orders of courts which are entitled to full faith and credit in this state. This chapter requires that an authenticated copy of a foreign judgment be filed with the clerk of the court with a filing fee.

N.D.C.C. § 14-07.1-06 provides:

Whenever a protection order is granted pursuant to section 14-07.1-02 or 14-07.1-03 and the respondent or person to be restrained has been served a copy of the order, a violation of the order is a class A misdemeanor and also constitutes contempt of court. A second or subsequent violation of a protection order is a class C felony subject to the penalties therefor.

On its face, N.D.C.C. § 14-07.1-06 limits initiation of a criminal action to only those protection or temporary protection orders issued pursuant to N.D.C.C. §§ 14-06.1-02 or 14-06.1-03. In addition, N.D.C.C. § 14-07.1-11(1) authorizes a warrantless arrest of a person who has committed the offense of violating a protection order under N.D.C.C. § 14-07.1-06.

18 U.S.C. § 2265(a) requires that an enforcing state enforce the protection order issued by another state or Indian tribe "as if it were the order of the enforcing state." In other words, the state or tribal protection order sought to be enforced in North Dakota would be treated as though that order had been issued by a North Dakota court. The criminal penalty and warrantless arrest provisions of North Dakota law appear to be inconsistent with 18 U.S.C. § 2265(a) in limiting enforcement of a protection order only to those protection orders issued by North Dakota courts pursuant to N.D.C.C. §§ 14-07.1-02 and 14-07.1-03. This conflict presents the question of whether 18 U.S.C. § 2265 pre-empts these North Dakota statutory provisions which are inconsistent with 18 U.S.C. § 2265.

The North Dakota Supreme Court in State v. Liberty National Bank and Trust Co., 427 N.W.2d 307, 309-10 (N.D.), cert. denied, 488 U.S. 956 (1988), set forth the well established standards for deciding a pre-emption question. The court recognized that federal pre-emption of state law can occur in one of three ways.

Congress may explicitly define the extent to which it intends to pre-empt state law by specifically declaring in a federal statute that it intends to pre-empt state law in a particular

field. Even if no express pre-emptive language exists, Congress may indicate an intent to occupy an entire field by regulation and impliedly pre-empt state law.

Finally, state law may be pre-empted to the extent that it actually conflicts with federal law. Conflict pre-emption occurs where compliance with both federal and state laws is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.

Although it may be concluded that, in adopting 18 U.S.C. § 2265, Congress intended to pre-empt state law in its implementation of the full faith and credit clause of the United States constitution (Article 4, § 1), such pre-emption also may be found by applying the third pre-emption standard, that is, conflict pre-emption.

The United States Supreme Court has expressed its reluctance to recognize federal pre-emption of state domestic relations laws. Mansell v. Mansell, 490 U.S. 581 (1989). However, it is apparent that Congress has intended to enter the domestic relations area to assist in the enforcement of protection orders throughout the United States. This intent is disclosed not only by 18 U.S.C. § 2265 but, also, by other statutory provisions adopted by Congress at the time of the passage of section 2265.

18 U.S.C. § 2261 imposes federal criminal penalties upon a person who travels across a state line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner and causes bodily injury to that person while intentionally committing a crime of violence. 18 U.S.C. § 2262 creates a federal criminal offense applicable to a person who travels across a state line or enters or leaves Indian country with the intent to violate a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the persons who are protected by the order. This provision also establishes a criminal penalty for causing a spouse or intimate partner to cross a state line or enter or leave Indian country by force, coercion, duress, or fraud when in the course or as a result of that conduct, the offender intentionally committed an act that injured that person's spouse or intimate partner in violation of a valid protection order issued by a state.

It is apparent from these federal statutory provisions that Congress intends that a protection order issued by a state or Indian tribe be readily enforceable outside the territorial jurisdiction of the issuing court and that substantial

protections be provided to those persons who are intended to be protected by the order. The penalty provisions of 18 U.S.C. §§ 2261 and 2262 also evidence a strong congressional desire to not only punish a person who violates a protection order but also to establish a substantial deterrent for such conduct. Enforceability of the federal statutory provisions will make it less likely that a violator of a protection order would feel that he or she was in some safe harbor when engaging in conduct beyond the territorial jurisdiction of the court which originally issued the protection order.

The Congressional intent and goals of 18 U.S.C. § 2265 are not inconsistent with the same intent and goals of the Parental Kidnapping Prevention Act found in 28 U.S.C. § 1738a. The North Dakota Supreme Court recognized in Dahlen v. Dahlen, 393 N.W.2d 765 (N.D. 1986), that, in cases of interstate custody disputes, the Parental Kidnapping and Prevention Act would govern if state law, specifically the Uniform Child Custody Jurisdiction Act of N.D.C.C. ch. 14-14, conflicts with the federal law.

Application of the supremacy clause of the United States Constitution (Article 6, clause 2) and the standards of pre-emption previously discussed, lead me to conclude that 18 U.S.C. § 2265 pertaining to the enforceability of protection orders issued by another state or by an Indian tribe pre-empts those provisions of North Dakota state law which are inconsistent with the federal law.

18 U.S.C. § 2265 mandates that any valid court protection order issued by another state or by an Indian tribe be treated as though it had initially been issued by a North Dakota court pursuant to N.D.C.C. § 14-07.1-02 or 14-07.1-03. Protection orders, as defined in 18 U.S.C. § 2266, therefore may be enforced in North Dakota as any North Dakota court-issued protection order subjecting violators of those orders to the criminal penalties set forth in N.D.C.C. § 14-07.1-06 or to a warrantless arrest as authorized in N.D.C.C. § 14-07.1-11. Such non-North Dakota court-issued protection orders must, however, be consistent with the requirements and exceptions of 18 U.S.C. § 2265(b) and (c). In addition, any criminal proceeding brought pursuant to N.D.C.C. § 14-07.1-06 will also require that the respondent or person to be restrained must have been served a copy of the order to be enforced.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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ATTORNEY GENERAL

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